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Pavel Vasilyev *

Beyond Dispassion: Emotions and Judicial Decision-Making in Modern Europe

* Polonsky Academy for Advanced Studies in the Humanities and Social Sciences at the Van Leer Jerusalem Institute, pavelv@vanleer.org.il

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Abstract

The conventional image of a judge as a dispassionate person continues to prevail in both popular culture and academic scholarship, despite influential recent research that has clearly demonstrated the inevitable impact of emotions on judicial decision-making. This article provides a historical perspective on what Terry Maroney has called »the persistent cultural script of judicial dispassion« and extends the discussion to modern continental legal systems. By looking at the legal debates that took place on the pages of professional periodicals and academic monographs across Europe, I show that the role of emotions was in fact an important topic in these discussions, with many participants advancing a very positive view of emotions as something that can help the judge arrive at correct decisions.

I further argue that there was a specific historical period around the turn of the 20th century when the discussions about the importance of emotions for legal judgment intensified greatly. I associate this trend with the emergence of the German free law movement and examine the influence of their radical ideas on legal scholars across Europe. In particular, I consider the experimental legal model of »revolutionary justice« that was introduced in Soviet Russia following the Russian Revolution of 1917 as an attempt to put the ideas of the free law movement into practice by placing a particularly strong emphasis on emotions in legal judgment. By bringing in the wider social and cultural context, the article provides new explanations for the rise and demise of the »emotional judge« between ca. 1880 and 1930 and the persistence of the »dispassionate« stereotype in the modern era.

Keywords: law and emotions, legal judgment, judicial dispassion, Freirechtsbewegung, revolutionary justice

Pavel Vasilyev

Beyond Dispassion: Emotions and Judicial Decision-Making in Modern Europe

Introduction

Anatolii Lunacharskii was a reserved man. Some even found the People's Commissar of Enlightenment boring, a bespectacled intellectual among fierce Bolshevik revolutionaries. Yet even he could not contain his excitement when writing about the new courts in the aftermath of the 1917 legal reform. Enthusiastically greeting the creative atmosphere in the courts, he exclaimed: »Down with the mummified courts [*sudy-mumii*], down with the huckster judges who are ready to continue to drink the blood of the living on the fresh grave of the absolute domination of capital. Long live the people that create a new law in their courts that are boiling and fermenting like young wine – justice for all, the law of the great fraternity and equality of the workers!«.[1]

Among other early initiatives of the new Russian government in the fall of 1917, legal reform was indeed one of the most radical. It proclaimed a quick and complete break with the past by abolishing all the pre-revolutionary laws and dismissing the old »bourgeois« judges. Early Soviet law also differed from most conventional legal systems that strongly emphasize rationality and offered a much more »emotional« perspective on the administration of justice.

The radical institutional break that the Soviet government sought to achieve with the court reform might seem very specific and peculiar to the revolutionary moment of October 1917. Yet, already at that time, many contemporaries noticed important continuities between the »psychological« or »intuitive« legal theories that emerged in late Imperial Russia and early Soviet legal experiments – as well as the strong influence that Western European (especially German) thought exercised on the legal developments in the early Soviet period.

This article build on influential recent research that has clearly demonstrated the inevitable impact of emotions on judicial decision-making (in particular by Susan A. Bandes and Terry Maroney)[2] and further challenges the conventional image of a judge as a dispassionate person that continues to prevail in both popular culture and academic scholarship. In doing so, this article provides a historical perspective on what Terry A. Maroney has called »the persistent cultural script of judicial dispassion«[3] and extends the discussion to modern continental legal systems. By looking at the legal debates that took place on the pages of professional periodicals and academic monographs across Europe, I show that the role of emotions was in fact an important topic in these discussions, with many participants advancing a very positive view of emotions as something that can help the judge arrive at correct decisions.

I further argue that there was a specific historical period around the turn of the 20th century when the discussions about the importance of emotions for legal judgement intensified greatly. I associate this trend with the emergence of the German free law movement (*Freirechtsbewegung*) and examine the influence of its radical ideas on legal scholars across Europe – and beyond. In particular, I consider the experimental legal model of »revolutionary justice« that was introduced in Soviet Russia following the Russian Revolution of 1917 as an attempt to put the ideas of the free law movement into practice by placing a particularly strong emphasis on emotions in legal judgment. By bringing in the wider social and cultural context, the article provides new explanations for the rise and demise of the »emotional judge« between ca. 1880 and

1 Lunacharskii (1917).
2 Bandes (2009), Bandes (2016), Maroney (2011a), Maroney (2011b), Maroney (2012), Maroney / Ackerman-Lieberman (2014), Maroney / Gross (2014).
3 Maroney (2011a).

1930 and the persistence of the »dispassionate« stereotype in the modern era.

Looking for Passionate Judges in History

The influence of emotions on judicial decision-making has been, as mentioned above, the focus of much recent scholarship on law and emotions, an emerging research field that has gained tremendous momentum over the last two decades, especially in the United States and the United Kingdom.[4] Prominent American legal scholar Terry A. Maroney has been particularly instrumental in establishing this new paradigm for thinking about the role of emotions in the administration of justice and challenging the stereotype of the dispassionate judge.[5] However (and perhaps unsurprisingly), most of the examples analyzed in this new scholarship come from contemporary Anglo-American (common law) legal systems, which are largely *precedent-based*.

The continental European (civil law) legal system is thus usually omitted from most conversations on law and emotions. Moreover, the reader of Anglo-American law-and-emotions literature might come to a (certainly unintended) conclusion that the civil law system is indeed devoid of emotions and better »protected« against judicial arbitrariness and emotionality by its very nature of being *codified*. This, however, is definitely not the case, and the scholars of the German legal context in particular have recently started exploring the arguably subtler roles that emotions play in continental legal systems.[6] By focusing on the criminal law systems of modern Germany and Russia, I seek to expand these discussions and to demonstrate the persistence of emotion in legal debates about judging throughout the modern period.

In doing so, I also introduce an important historical dimension that is often overlooked by legal scholars of emotion. While there have been attempts to write about emotions and judicial decision-making from a historical perspective, these often try to cover a very large domain in a peculiarly unsystematic manner. Terry A. Maroney and Phillip Ackerman-Lieberman's recent article on judicial empathy might be the most symptomatic example of this approach.[7] In choosing their historical examples, the authors join together the rather unconnected case studies from the Babylonian Talmud and the early-20th-century American legal realist movement, building their main argument around comparing the two. While the resulting analysis might yield some interesting serendipitous insights, there is clearly a need for more systematic research on the history of emotion and legal judgment that would also be more attentive to the specificity of the local social and cultural context.

Recent historical research on 19th century judging, for example, has unearthed numerous cases that are very difficult to reconcile with the »dispassionate« stereotype. As Katie Barclay's analysis of performing emotions and bodily practices in the Irish courts between ca. 1800 and 1845 have demonstrated, biological understandings of gender, race and nationality have all influenced the perceptions and expectations of bodily performance while on trial. In line with these expectations, the judges were active participants in this performance, demonstrating both their authority over and pity for the offender through bodily gestures that included shedding tears and outright weeping.[8] Similarly, Meg Arnot's investigation of case studies from mid-19th century England has revealed the complexities surrounding these »weeping judges« in the wider context of gendered understandings of violence and its treatment by the contemporary criminal justice system.[9]

While the two examples discussed above focused exclusively on the common-law tradition as it manifested itself in the British Isles, Gian Marco Vidor has applied a similar approach in his analysis of legal discussions about judicial emotions in the continental legal context of late-19th and early-20th-century Italy. In an unpublished manuscript, Vidor shows how positivist scholars of the period sought to redefine the traditional notion of judging and to introduce new expectations of the judicial profes-

4 Bandes (1999), Maroney (2006), Schweppe / Stannard (2013), Maroney (2016).
5 Maroney (2011a), Maroney (2012).
6 Ellerbrock / Kesper-Biermann (2015), Köhler et al. (2016), Landweer / Koppelberg (2016), Landweer / Bernhardt (2017).
7 Maroney / Ackerman-Lieberman (2014).
8 Barclay (2017).
9 Arnot (2016).

sion.[10] In particular, the »modern« judge increasingly came to be seen as someone possessing »a deep knowledge of the heart of human beings« and a thorough understanding of the new scientific discipline of psychology, including the knowledge of human emotions and the embodied »sentiments of justice and duty« (*dai sentimenti della giustizia e del dovere*).[11] Importantly, in the specific historical context of post-unification Italy, it also involved understanding local cultures and being sensitive to the different »emotional styles« of various Italian regions (*propri sentimenti particolari*).[12]

Thus, emerging research on the history of law and emotions has further emphasized the role of emotions in judicial decision-making and charted several possible ways of analyzing emotional sentiments of the judges of the past. Importantly, these researchers have also stressed the importance of taking into account the wider social and cultural context and the prevalence of racial, gender and class biases throughout the legal history of modern Europe. Nevertheless, there is a pressing need for more conceptualization and empirical exploration, particularly in the case of the lesser-studied region of Central and Eastern Europe. In the pages that follow, I attempt to complement emerging scholarship by looking at the theoretical legacy of the German free law movement (*Freirechtsbewegung*) and its implementation in practice in Soviet Russia following the Russian Revolution of October 1917.

Situating the *Freirechtsbewegung*

As mentioned above, a significant part of recent historical research on emotions in continental legal systems has been devoted to the study of the German legal context, challenging the stereotypical picture of the cold-hearted German nation and the automatic operation of bureaucratic mechanisms in Berlin or Vienna. Indeed, the emphasis on German-language legal scholarship is well justified given its prominence and influence across modern Europe.[13] For example, the »sentiments of justice and duty« mentioned above in the context of fin-de-siècle Italy can also be linked to the contemporary German discussions of *Rechtsgefühl* [literally: »the feeling of law«], the notoriously ill-defined juridical notion that has been alternatively translated as »an innate feeling for justice … an inner moral sense … a trained feeling for the written law and for legal right … a juridical intuition or hunch«.[14]

In her dissertation and related publications, Sandra Schnädelbach showed how the seemingly specialized juridical debates about the meaning of the term *Rechtsgefühl* in fact reflected wider shifts in the understandings of both »law« and »emotion« in a period when the newly born German state was undergoing rapid modernization and seeking to establish itself on the world stage and the newly developing natural sciences were also producing new conceptualizations of human psychology and behavior.[15] Significantly, these debates were always entangled in the wider discussions about bourgeois honor, masculinity, and professionalism, with the (male) judge as a successful »manager of emotions« emerging as an ideal judicial character of the period.[16]

Rechtsgefühl was indeed one of the most debated juridical notions of the period, and the participants of the discussions in legal periodicals often disagreed about its meaning and implications, with some scholars advancing a very positive understanding of the role of emotion in legal judgement specifically and a rather unconventional view of the administration of justice more generally. One example of this was the so-called free law movement (*Freirechtsbewegung*) that emerged in Germany and Austria-Hungary around 1900 and was associated with jurists such as Eugen Ehrlich, Ernst Fuchs and Hermann Kantorowicz in particular. In their writings, the members of the free law movement offered a sharp critique of the conventional legal systems of continental Europe and proposed a rather radical alternative in the form of »free law«.[17]

More specifically, with their emphasis on »free legal interpretation« (*freie Rechtsfindung*) and »living law« (*lebendes Recht*), the free law movement attributed significant power and autonomy to the

10 Vidor (2015).
11 Mantegazza (1867) 379–384.
12 Berardi (1908) 151.
13 Herget/Wallace (1987) 402.
14 Schnädelbach (2015) 47.
15 Schnädelbach (2015).
16 Schnädelbach (2015) 57–61.
17 Flavius [Kantorowicz] (1906), Ehrlich (1913), Fuchs (1929).

figure of the judge, who was supposed to *create* the actual law in the courtroom rather than simply follow or interpret codified law.[18] Significantly, this implied the relatively unrestrained application of *Rechtsgefühl* and a much more »emotional« perspective on the administration of justice. Clearly, this highly independent and seemingly voluntarist figure of the judge posed a certain challenge to the bourgeois conventions of the period and the acceptance of reason as a primary source of judicial decisions. This radical attitude helped the movement to attract new followers and to seize some ground from the more traditional legal schools, but in the end it also posed significant limitations for its practical functioning in the socio-economic and cultural climate of late Wilhelmine and Weimar Germany.

Echoing Schnädelbach, I would like to emphasize the wider social and cultural context of the free law movement and to connect it to other cultural »movements« of the period. For example, the »Free Body Culture« (*Freikörperkultur*) movement that emerged in Germany around the same time as the *Freirechtsbewegung* sought to advance cultural – but also political – liberalization by endorsing the naked body and promoting living in close contact with nature.[19] On a more general level, a range of movements known in German collectively as *Lebensreform* (»life reform«) openly challenged many of the bourgeois conventions of that time and promoted an alternative lifestyle that would ultimately become known as »the counterculture«.[20] When viewed in this context, the free law movement can also be described as a kind of »life reform«, offering a critique of industrialized capitalist society and aiming at a more open adjudication of human conflicts with a somewhat anarchist outlook.

While the *Freirechtsbewegung* might have been considered a marginal legal school or a part of a fringe cultural movement in the early 20th century, legal scholars have recently called for a reevaluation of its legacy and emphasized many potential applications in fields ranging from legal philosophy and the sociology of law to ethnography and the cultural history of the late Habsburg Empire.[21] Moreover, its influence was not confined to the German-language legal community, as has been noted in the case of American legal realism movement in particular.[22] In the next section of this article, I would like to examine the role that theories of the free law movement played in the construction of an experimental legal system called »revolutionary justice« in the aftermath of the Russian Revolution in 1917.

Revolutionary Justice and Its Legacies

It is sometimes overlooked that the free law movement in fact had strong ties to Eastern Europe from its very beginning. One of the founders of the *Freirechtsbewegung*, Eugen Ehrlich, taught at the University of Czernowitz in the peripheral Austro-Hungarian province of Bukovina (present-day Chernivtsi in contemporary Ukraine). And indeed, as Monica Eppinger and Assaf Likhnovski noted, the peculiar multicultural and multilingual composition of this outlying land under the Habsburg crown greatly influenced Ehrlich and his views on how legal systems function and the role of emotions in the administration of justice.[23]

It is thus not surprising that the ideas of the free law movement were well received in the multiethnic and poorly governed Russian Empire, which was at that time transitioning from an autocratic monarchy to a democratic republic (briefly) to a »dictatorship of the proletariat«. This transition took place over the first two decades of the 20th century and was accompanied by numerous violent upheavals in the form of three revolutions (1905–1907, February 1917, and October 1917), two international wars (the Russo-Japanese War of 1904–1905 and the First World War) and a civil war (ca. 1917–1922).

Innovative ideas of the free law movement started to gain traction already in late Imperial Russia in the first decades of the 20th century, with scholars such as Lev Petrazhitskii, Iosif Pokrovskii and Pavel Novgorodtsev developing related legal theories that they called »psychological« or »intuitive«.[24] They similarly stressed the moral origins of law and even proposed considering the law as a kind of emotion itself.[25] Their theories, not unlike

18 Riebschläger (1968) 93–105.
19 Dickinson (2011), Levine (2016).
20 Green (1986).
21 Silberg (2005), Hertogh (2008).
22 Herget/Wallace (1987), Maroney/Ackerman-Lieberman (2014), Maroney (2016).
23 Eppinger (2008), Likhovski (2008).
24 Walicki (1987) 213–290.
25 Posnov (2006).

those of their German counterparts, remained relatively marginal in the conservative cultural and intellectual climate of the late Russian Empire. Nevertheless, some of the more radical ideas of the »psychological« legal school were quickly adopted by Russian Marxist jurists, such as Mikhail Reisner or Isaak Shteinberg, who similarly applauded creative application of legal norms and an emphasis on emotions in legal judgment.[26]

The Russian Revolution of 1917 provided an unexpected opportunity to put these seemingly abstract and speculative ideas into real-life practice, with Shteinberg even serving (albeit relatively briefly) as the People's Commissar (Minister) of Justice in 1917–1918. The system of »revolutionary justice« (*revoliutsionnaia zakonnost'*) that was implemented in Soviet Russia in the immediate aftermath of the Bolshevik takeover sought to establish a radical break with the despised »capitalist past«. More specifically, the Soviet government abolished all pre-revolutionary laws and proclaimed that the judges were officially supposed to be guided by their »revolutionary conscience« (*revoliutsionnaia sovest'*), »revolutionary legal consciousness« (*revoliutsionnoe pravosoznanie*) and »revolutionary feeling of justice« (*chuvstvo revoliutsionnoi zakonnosti*) – not confined by the written »bourgeois law«.[27]

Petr (Peteris) Stuchka, who, in a strange manner of the first months of post-revolutionary turmoil, both preceded and succeeded Shteinberg in the office of the People's Commissar of Justice, was one of the authors of the Soviet Decree No. 1 »On Courts«. In his recollection of these historical decisions taken in late 1917, he summarized the idea of the decree in two points: »1) to get rid of the old courts and 2) to abolish all the old laws«. Allegedly, Vladimir Lenin himself became »an ardent supporter« of the decree and appreciated the lucid laconism with which it sought to establish a new, post-revolutionary legal order.[28]

In the curious political and ideological climate of the period, when all things were suddenly possible and all social institutions were malleable, radical ideas inspired by the *Freirechtsbewegung* were taken to new extremes. For example, in comparison to Evgenii Pashukanis's or Aleksandr Goikhbarg's conceptions, Stuchka's legal philosophy appeared moderate.[29] Goikhbarg, who eventually established a legal journal called *Sovetskoe pravo* (Soviet Law), occupied a principally »anti-legal« position and became increasingly skeptical of the term »law« itself.[30] Similarly, Pashukanis's predictions about absolute disappearance of the law in the not-so-distant communist future[31] won him both supporters and enemies among the readers and authors of early Soviet legal periodicals.[32]

These far-reaching intellectual developments were accompanied by a correspondingly significant legal reform on the grounds that sought to democratize the local courts and to establish conditions for both men and women to participate in them. Moreover, the judges were supposed to be appointed primarily on the basis of their class origin, with preference given to the representatives of the working class.[33] Since, in the words of a contemporary lawyer, »the trial of the workers by the workers gives the best guarantee of the mutual understanding in regard to the conditions of everyday life, worldview, customs, and the whole way of life«,[34] community courts (*tovarishcheskie sudy*) consisting of the members of a working collective were also established to adjudicate minor offences. In these courts, the emotional practice of public shaming was a commonly passed sentence.

At the same time, the context of the ongoing Civil War and foreign military intervention meant that the Bolshevik party and the Soviet state continued to play an important role in the administration of justice. Special extrajudicial institutions were formed to tackle the ill-defined crime of »speculation«, and, as Sergei Iarov convincingly demonstrated, every inconspicuous everyday incident or misdemeanor could then be interpreted as a dangerous criminal offence, which was punishable with harsh measures ranging up to summary execution. Additionally, the lack of literate workers able to handle judicial bureaucracy meant that the Soviet state continued to employ »bourgeois« legal specialists long after the revolution, effectively leaving the legal reform unfinished.[35]

26 Reisner (1908), Shteinberg (1914).
27 O Sude (1918) 404, Trainin (1922) 5, Totskii (1922) 9–10.
28 Stuchka (1934) 91, 116.
29 Stuchka (1927).
30 Goikhbarg (1924).
31 Pashukanis (1927).
32 Sharlet (1978), Iashchuk (1999).
33 Lunacharskii (1917).
34 Portugalov (1922) 31.
35 Portugalov (1922) 31–32, Chel'tsov-Bebutov (1924) 50, 54.

On 1 June 1922, the first Penal Code of the Russian Soviet Federative Socialist Republic (RSFSR), which was meant to achieve a »solid foundation of the revolutionary legal order«,[36] came into force, and other codes followed swiftly in 1922–1923. This move was accompanied by the ongoing »normalization« in the political, economic, social and cultural spheres, and everyday life more generally, as the Soviet state moved away from revolutionary experimentation and embraced a semi-capitalist, mixed-economy system known as the NEP (*Novaia ekonomicheskaia politika*). On the surface, there was not much left of the revolutionary justice project.

I, however, would like to suggest that there were several important legacies of this bold legal experiment. On the one hand, the chaos of the Civil War proved to be a very memorable and often nostalgic experience that stayed with the Red-Army-soldiers-turned-party-officials even as they were climbing up the newly established ladder of Soviet bureaucracy.[37] Even as Soviet law became codified over the course of the 1920s, the commentators continuously stressed that »the revolution has not been put on the shelf, and revolutionary legal consciousness should stand out in every verdict: it is restricted by the written norms, but it is not abolished«.[38]

There were, however, other unintended consequences of the revolutionary justice project. It can be argued that the 1920s also witnessed increased hostility towards law and a strong preference for technical administration on the part of the Soviet *apparatchiki*.[39] This ultimately contributed to the establishment of totalitarian Stalinist control and made mass state violence possible.[40] In a cruel irony of fate, this trend mirrored the contemporary developments in Nazi Germany, where the courts were encouraged to engage in a *Freirechtsbewegung*-inspired »free interpretation of amorphous terms in order to foster Nazi ›morality‹« and »the notion of free law was … placed into the service of the totalitarian regime«.[41]

More generally, however, the result of this shift in the visions of law and legal functioning was a popular and widely held perception of the Soviet judicial system as inherently arbitrary. One characteristic example of this attitude is Ekaterina Mishina's recent contribution to the Institute of Modern Russia (IMR), a liberal think-tank associated with exiled Russian oligarch and opposition leader Mikhail Khodorkovskii. In this scathing critique, the author traces all the negative trends in the contemporary Russian rule of law to the arbitrariness of the early Soviet judicial system and ultimately holds it responsible for providing »a pseudo-legalization for the massacre of hundreds of thousands of innocent people«.[42] While there is solid evidence of codified Soviet law and a much more predictable (albeit still strongly ideological) legal system that existed in Russia in the second half of the 20th century in particular,[43] such views continue prevail among many legal experts and the general public.

Finally – and in an interesting twist of the previous thesis – there also seem to be deeply held perceptions of the »emotional« judicial system as somehow inherently »liberal« or »socialist«. For example, Susan A. Bandes discussed how Barack Obama's famous statement on appointing empathetic Supreme Court judges (»we need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom … [and] to understand what it's like to be poor, or African-American, or gay, or disabled, or old«) almost necessarily invited a critical response from the conservative spectrum of American politics, who were still clearly having difficulties with reconciling empathy and the rule of law.[44]

Conclusion

There is ample evidence to conclude that modern continental legal systems were not as rationally inclined as they would sometimes like to present themselves. In fact, emotions in judicial decision-making have been continuously discussed in civil-law jurisdictions throughout the 19th and 20th centuries, with many legal scholars defending a rather positive view of emotion as an important factor in the judge's deliberations. Such conceptions were

36 O vvedenii v deistvie Ugolovnogo Kodeksa Rsfsr (1922).
37 Brovkin (2004), Buldakov (2013).
38 Slavin (1922) 7.
39 Sharlet (1978) 176–180.
40 Timasheff (1946), Engelstein (1993), Gill (2002).
41 Herget/Wallace (1987) 418–419.
42 Mishina (2013).
43 Solomon (1997).
44 Bandes (2009) 134–135.

developed at greater length and on a stronger theoretical basis in Germany and Austria-Hungary around the turn of the 20th century – and even put into practice for a relatively brief period in the format of »revolutionary justice« that existed in the aftermath of the Russian Revolution of 1917. Importantly, they were always deeply entangled in broader social and cultural concerns of the period and reflected existing gender, ethnicity, and class hierarchies.

To the extent they were permitted to do so within the early Soviet ideological framework, revolutionary judges readily considered the emotions and the material circumstances of the accused and often empathized with the defendants in their sentencing. Archival evidence that I have examined elsewhere provides a convincing counter-narrative to popular perceptions of the early Soviet judicial system as exclusively harsh and punitive.[45] The law enforcers themselves, however, functioned in truly dire workplace conditions and had to deal with numerous institutional, material, and political constraints. As everyday life in Soviet Russia normalized by the mid-1920s, »revolutionary justice«, too, came to be perceived rather as a bold legal experiment, a somewhat embarrassing relic of the turbulent times of the Civil War.

Utopias, however, can only be identified in retrospect. Recent decades have witnessed a renewed scholarly, professional, and lay interest in affective explanations of criminal behavior, the role of emotions in legal judgment, and the navigation of emotions in the courtroom. But all these topics were at the core of the revolutionary justice project, and it may well be time to reconsider the significance of its contributions. It is my hope that the early Soviet legal experiment will finally get the attention it deserves.

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45 Vasilyev (2017a), Vasilyev (2017b).

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